UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PETER SUNG OHR, REGIONAL DIRECTOR OF REGION 13 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ARLINGTON METALS CORPORATION,

Respondent.

Civil No. 15-cv-08885

Judge St. Eve
Magistrate Judge Martin

BRANDON DELACRUZ'S AMICUS CURIAE BRIEF IN OPPOSITION TO THE NLRB'S MOTION FOR AN INJUNCTION

I. INTRODUCTION

Brandon DeLaCruz ("DeLaCruz"), by and through his undersigned counsel, submits this proposed Brief Amicus Curiae in Opposition to the National Labor Relations Board's ("NLRB" or "Board") efforts to secure an injunction under Section 10(j) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(j).

DeLaCruz is employed by Respondent Arlington Metals Corporation ("AMC"). He was the leader of an employee effort to remove the United Steel, Paper and Forestry Union ("USW" or "Union") as the representative of AMC employees. DeLaCruz collected signatures against USW representation from a majority of his co-workers (16 of 26) on July 9, 2014, and promptly delivered his majority petition to AMC. (*See* ECF Docket 18, Attachment 1, Ex. C). AMC honored the wishes of the majority of its employees, and withdrew recognition of a minority union. *Id*. No party to this case seriously contests the validity of those decertification signatures.

In this action, Peter Sung Ohr, Regional Director of Region 13 of the National Labor Relations Board ("Region 13") seeks to negate DeLaCruz and his colleagues' exercise of their right to refrain from union representation via a preliminary injunction under NLRA Section 10(j). Such an injunction would force DeLaCruz and his co-workers back under USW representation, against their express wishes. Region 13 seeks this result on the paltry grounds that AMC refused to provide the USW with certain financial information during a bargaining session more than fifteen months ago. Region 13's effort to have this Court order AMC to recognize and bargain with the USW is, in reality, a demand that DeLaCruz and his fellow employees be forced into a compulsory agency relationship with the USW against their will.

DeLaCruz and a majority of the employees working at AMC strongly oppose entry of any order that reinstates the USW as the bargaining representative of AMC employees and nullifies DeLaCruz's statutorily protected decertification efforts.[1] Highlighting his interest in these Section 10(j) proceedings and his personal efforts to protect his and his co-workers' right to decertify, DeLaCruz informs the Court that he filed a Motion to Intervene in the underlying NLRB administrative case. (*See* ECF Docket 18, Attachment 1, Exs. A & B). Because the NLRB's Administrative Law Judge denied his Motion to Intervene and refused to allow him to participate in the administrative proceedings, DeLaCruz has also filed Exceptions from that denial to the full NLRB, which remain pending. (DeLaCruz's Exceptions and briefs in support are accessible on the NLRB's website at https://www.nlrb.gov/case/13-CA-122273).

Indeed, it is DeLaCruz and the AMC employees who signed his decertification petition who have the greatest interest at stake in this action, as they are the *only* entity involved in this

[1] Many of the AMC employees who agree with Mr. DeLaCruz are expected to testify at the hearing set for November 12, 2015, and the undersigned attorneys represent those employees as well.

case possessing a statutory right to refrain from union representation under Section 7 of the NLRA, 29 U.S.C. § 157. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) ("By its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers.") (emphasis in original).

II. ARGUMENT

In cases filed under NLRA Section 10(j), 29 U.S.C. § 160(j), federal courts apply a traditional equitable analysis when considering whether interim injunctive relief is warranted. *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1566-67 (7th Cir. 1996). Federal courts must evaluate: (1) the threat of irreparable harm to the movant; (2) the balance between the harm to the movant and the harm to other parties if the injunction is granted; (3) the movant's probability of success on the merits; and (4) the public interest. *Id.*

In applying these standards as it reviews Region 13's request for an injunction, this Court must necessarily consider the harm an injunction would cause to DeLaCruz and his co-workers, and to the greater public interest. *McKinney ex rel. NLRB v. S. Bakeries*, 786 F.3d 1119, 1125 (8th Cir. 2015) (overturning a district court's 10(j) injunction where the court refused to take employees' overwhelming opposition to the union into account).

A. The Employees' Representational Desires Are Given Paramount Weight Under a Proper Reading of the NLRA.

1. Brandon DeLaCruz and his co-workers have a statutory right under Section 7 of the NLRA, 29 U.S.C. § 157, to "bargain collectively through representatives of their own choosing" and to "refrain" from so doing. Section 7 rights are the *only* rights granted by the NLRA, and those rights are granted *only* to employees, not to unions or employers. *See Lechmere*, 502 U.S. at 532. It is the "NLRA's core principle that a majority of employees should be free to accept or

reject union representation." *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (D.C. Cir. 1983); *see also Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001) ("This core provision guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all."). Because these principles of free association are embedded in federal labor law, the NLRB has no power to order bargaining with a union that does not enjoy majority support among the employees. *Conair*, 721 F.2d at 1383-84; *see also NLRB v. Cell Agric. Mfg. Co.*, 41 F.3d 389, 398 (8th Cir. 1994) (bargaining orders are to be issued sparingly, and "the Board must consider any change of circumstances, including the passage of time, employee turnover, and voluntary statements of cooperation by company officials, when deciding whether to issue a bargaining order.") (footnote omitted).

Yet at every turn, Region 13 and the USW have undermined employees' right to freely reject a labor union, and are attempting to force upon them a non-majority union via a Section 10(j) injunction. DeLaCruz exercised his statutory right to refrain under NLRA Section 7 when he led the employees' efforts to decertify, but Region 13 has done everything in its power to fight him and entrench in his workplace an unpopular and unwanted incumbent union.

Given the majority opposition to the USW, s*ee* ECF Docket 18, Attachment 1, Ex. C, an injunction in this case would be in complete derogation of the Supreme Court's holding in *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961), that "[t]here could be no clearer abridgment of § 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity," than "grant[ing] exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority." *Id.* at 737 (citation omitted).

That is precisely what is happening here, as Region 13 seeks to have a minority union, rejected by the employees, thrust back onto them.

The harm of forcing a minority union on these employees is magnified under the NLRA because "the congressional grant of power to a union to act as exclusive collective bargaining representative" necessarily results in a "corresponding reduction in the individual rights of the employees so represented." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). DeLaCruz and his co-workers oppose any such "reductions" in their individual rights wrought by an injunction, including the imposition of an unwanted third party to control their working conditions and exclusively speak for them with their employer. Exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co*., 388 U.S. 175, 180 (1967).

Forcing AMC employees into an unwanted agency relationship with a minority labor union impairs not only their Section 7 rights under the NLRA, but their constitutional rights as well. This was recognized in *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1286-88 (11th Cir. 2010), where an NLRA-covered employee challenged an organizing agreement between his employer and a union that sought to represent him as an illegal "thing of value" under NLRA Section 302, 29 U.S.C. § 186. In its defense, the union argued the employee suffered no cognizable injury simply by having a union negotiate on his behalf, because Florida was a Right to Work state and employees would not have to pay dues as a condition of his employment. The Eleventh Circuit strongly disagreed.

> Mulhall has a cognizable associational interest under the First Amendment to challenge the alleged collusive arrangement between the employer and the union under § 302. If Unite is certified as the majority representative of Mardi Gras' employees, Mulhall will have been thrust unwillingly into an agency relationship, where the union is his "exclusive representative[ ] . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" under § 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a). . . . Moreover, regardless of whether Mulhall can avoid contributing financial support to or becoming a member of the union [under a Right to Work law], its status as his exclusive representative plainly affects his associational rights.

618 F.3d at 1286-87.

In furtherance of these principles, the Eighth Circuit recently found that the Board cannot show the irreparable harm necessary to grant a 10(j) request if there is "objective evidence" the union lacked majority support at the time the employer withdrew recognition of the union. *Southern Bakeries*, 786 F.3d at 1124-25. The purpose of a 10(j) motion is to prevent further erosion of a union's bargaining power. But, as the Eighth Circuit noted, "[b]ecause the Union had long been out of favor, when, if ever, Southern Bakeries is ordered to recognize the Union, the Union would have to perform largely the same work to rebuild support from employees." Here too, DeLaCruz and his fellow AMC employees have long been dissatisfied with USW representation, and they will be greatly harmed if forced back under the yoke of that minority union.

In short, DeLaCruz and his co-workers will suffer tangible harm by virtue of an injunction that thrusts them into an unwanted agency relationship with a union that would be empowered to speak exclusively on their behalf with their employer. This harm—forced "representation" by a minority union—must be taken into account as this Court considers exercising its equitable powers.

2. In this and many other cases, the NLRB has turned American labor law on its head, with the master serving the servant and the servant controlling the master. Under the NLRA, employees are supposed to be the masters and unions their fiduciary agents. *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 567-69 (1990) (union's duty toward represented employees is akin to that of a trust fiduciary); *Lechmere*, 502 U.S. at 532 ("NLRA confers rights only on *employees*, not on unions or their nonemployee organizers"); *MGM Grand Hotel, Inc.*, 329 NLRB 464, 475 (1999) (Member Brame, dissenting) ("[T]he Board must never forget that unions exist at the pleasure of the employees they represent. Unions *represent* employees; employees do not exist to ensure the survival or success of unions.") (emphasis in original). Under these principles, employees should be able to exercise firm control over the actions of their bargaining agent, to include discharging the agent at will when its services are no longer wanted.

Instead, an injunction would make the USW the AMC employees' master, entitling it to remain as the exclusive bargaining representative over the vehement objections of a majority. This Court is asked to recognize and protect employees' rights to disassociate from an unwanted union, as NLRA Section 7 provides workers with a broad right to refrain from "any and all" union activities. When properly construed, the NLRA allows employees great latitude to discharge a union that has lost majority support. *Int'l Ladies' Garment Workers' Union*, 366 U.S. at 737-38. That is precisely what DeLaCruz and his co-workers have been trying to do for well over a year, only to be blocked at every turn by the USW and Region 13.

In short, when assessing the propriety of the injunction and scrutinizing the harm caused by a compelled agency relationship, this Court should place employees' representational desires at the top of the pyramid, not the bottom.

B. Employees' Rights of Free Association Are Superior to Region 13's or the USW's Interests.

In addition to impinging on AMC employees' rights under the NLRA, an injunction would impair those employees' constitutional right of free association, including the right of non-association. *Wooley v. Maynard*, 430 U.S. 705 (1977). Here, a majority of AMC employees has demonstrated their desire to refrain from association with the USW. The Supreme Court has explicitly protected "forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members." *Griswold v. Conn.*, 381 U.S. 479, 483 (1965); *see also Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.") (citation omitted). AMC employees need this Court to protect their right to freely disassociate from the USW, since Region 13 refuses to do so. *See, e.g., Pattern Makers v. NLRB*, 473 U.S. 95 (1985) (employees have a statutory right to resign at will from union membership).

DeLaCruz has no desire to see his freedom of association diminished on the NLRB's false altar of "labor stability." *Harris v. Quinn*, ___ U.S. ___, 134 S. Ct. 2618, 2629 (2014), citing *Ry. Emps' Dep't v. Hanson*, 351 U.S. 225, 236–37 (1956) (Supreme Court questions a labor law that "'forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought,' or a law that forces a person to 'conform to [a union's] ideology'").

An injunction that forces DeLaCruz and his co-workers into a compulsory agency relationship with the USW plainly implicates their freedom to associate guaranteed by the First Amendment to the United States Constitution. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609,

623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate."). An injunction order would give the USW the legal authority to speak for, bargain for, and contract on behalf of DeLaCruz and his colleagues with respect to their terms of employment. *See* 29 U.S.C. § 159(a); *Mulhall*, 618 F.3d at 1286-88. It is akin to requesting that the Court designate an individual as the legal guardian of another person against his or her will. This impingement of the constitutional right of free association should not be allowed where a majority of the employees have expressly rejected the USW. (*See* ECF Docket 18, Attachment 1, Exs. A-C).

C. The NLRB Should Protect Employee Free Choice and Stop Operating as an "Incumbent Protection Squad."

DeLaCruz believes that AMC acted properly in honoring the employees' wishes when it ceased bargaining and withdrew recognition of the USW. *See Dura Art Stone, Inc.*, 346 NLRB 149 (2005) (employer must cease negotiating with union that it knows has lost majority support); *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 652 (D.C. Cir. 2013) (employer properly withdrew recognition of union based upon a majority employee petition). In the fifteen months since AMC's withdrawal of recognition, DeLaCruz and his co-workers have worked as content, union-free employees. Not surprisingly, the USW has not filed an election petition seeking to regain representation rights via the ballot box. Rather, the USW seeks to litigate its way back to power with the help of Region 13, rather than face employees at the ballot box.

Region 13 is effectively operating as the USW's "incumbent protection squad," vetoing the employees' efforts to decertify the union and attempting to thrust an unwanted union onto them. No serious consideration has been given to employees' wishes or their right to free choice. It is no wonder that one federal judge recently referred to the NLRB as the litigation and organizing arm of labor unions. *NLRB v. UPMC Presbyterian Shadyside*, No. 14-mc-00109,

2014 WL 4348180 (W.D. Pa.) (Sept. 2, 2014) ("the NLRB's efforts to obtain said documents for, and on behalf of, the SEIU, arguably moves the NLRB from its investigatory function and enforcer of federal labor law, to serving as the litigation arm of the Union, and a co-participant in the ongoing organization effort of the Union").

In a similar vein, federal courts have frequently condemned the Board's penchant for forcing questionable "bargaining orders" onto employers and employees. *Caterair Int'l v. NLRB*, 22 F.3d 1114, 1123 (D.C. Cir. 1994) ("Five times in the past fourteen years this court has remanded such [bargaining] orders to the Board with a request for explanation as to why, in the particular circumstances, the extra protection against decertification was necessary. This case makes it an even half-dozen."). The D.C. Circuit has done so "[b]ecause affirmative bargaining orders interfere with the employee 'free choice,'" and the Court has "long viewed them with suspicion." *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1461 (D.C. Cir. 1997), citing *Skyline Distribs. v. NLRB*, 99 F.3d 403, 411 (D.C. Cir. 1996); *see also Tenneco Auto.*, 716 F.3d at 652 (overturning NLRB bargaining order issued in the face of a majority petition against union representation; "[c]onsidering the whole record, we think it apparent that substantial evidence does not support the Board's finding that Tenneco's conduct tainted the decision of the employees to sign a petition for decertification.").

III. CONCLUSION

Because his Court is charged with protecting employees' rights and the public interest as it considers Region 13's request for an injunction to re-establish the USW as the workplace union, it must take into account AMC employees' true representational preferences. *Southern Bakeries*, 786 F.3d at 1125. When the Court takes those employee preferences into account, Region 13's request for relief under NLRA Section 10(j) must be denied.

Respectfully submitted,

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